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**No. 88-292**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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RUDY G. REINHARD, *et al.*,
*Petitioners,*

vs.

BARBARA CONNER,
*Respondent.*

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Questions for Review as stated by Petitioners (Petition at 1-2) mischaracterize the legal issues at bar. The Respondent recasts them as follows:

1. In ruling upon a motion for summary judgment in which qualified immunity is claimed, must the reviewing court consider the entire record and view it in the light most favorable to the non-movant?
Answer below: Yes.

2. In May of 1982, was the constitutional right of a public employee to speak on a matter of public concern, as a private citizen but during working hours, in a manner in which the functioning of the employer was not impaired, clearly established?
Answer below: Yes.

3. In a case in which the subjective intent of the defendant is an essential element of the constitutional violation claimed (such as in a retaliatory discharge), and in which there is a genuine issue of material fact as to that intent, is the defendant entitled to qualified immunity?
Answer below: No (issue reached only by concurrence).

4. Under the federal common law, is a public official sued in his or her personal capacity in privity with his or her employer for purposes of res judicata (claim preclusion)?
Answer below: No.

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## OPINION BELOW

The decision of the Seventh Circuit Court of Appeals for which Petitioners seek a Writ of Certiorari from this Court is reported as *Conner v. Reinhard*, 847 F.2d 384 (7th Cir. 1988). That

opinion was written by the Honorable Harlington Wood, Jr., Circuit Judge. The Honorable Richard D. Cudahy, Circuit Judge, wrote a brief concurring opinion.

In this Brief, for the convenience of the Court, citations to *Conner* will contain pinpoint citations to both the published and slip opinions. The slip opinion is the first item in the Appendix of Petitioners.

## STATEMENT OF THE CASE

The facts of the case underlying the petition for certiorari are adequately and concisely set forth in the opinion of the Court of Appeals for the Seventh Circuit. *See Conner*, 847 F.2d at 386-87 (slip op. at 2-5).

The Statement of the Case by petitioners (Petition at 9-16) contains the following errors: First, it leaves out (as did the trial court) the portion of the meeting transcript that makes it clear that Conner tried to speak solely as a citizen but was forced to identify her employer.

Camilli: Is there anybody else that would like to speak?

Conner: I'd like to speak a little bit about the Contingency Fund not being for this purpose.

Marinan: What are you linked to?

Conner: I'm a citizen of Green Bay.

Marinan: You have no right to speak now.

Venci: Why? We suspended the (regular) order to let everybody speak.

Zolper: Well, if you're going to speak then we want your name and address and your position . . . what you do for a living.

Marinan: And we want to cross examine you . . . tell how you know that fact.

Venci: That's really intimidation, you guys.

Zolper: It's not.

*Id.* at 386 (slip op. at 2-3); *Compare id. with* Petition at 10; *Conner v. Reinhard*, No. 85-C-719, slip op. at 2 (E.D. Wis. Mar 26, 1987) (order granting summary judgment) (Appendix of Petitioners at 30, 32).

Second, the Petitioner leaves out important testimony in the record that constitutes direct evidence of retaliatory animus on the part of the Defendants.

> At the earlier trial against the City of Green Bay, [Sheila Cody] O'Connor testified to a conversation she had had with defendant Reinhard a few days after the Board of Ethics meeting. O'Connor stated that Reinhard told her Zolper had visited him that morning and was upset with Conner's behavior at the May 12th meeting. Reinhard said that Zolper wanted Conner fired, and if she was not fired, Zolper would have her position eliminated at budget time.

*Conner*, 847 F.2d at 396 (slip op. at 23).

Finally, Respondent Conner avers that unconstitutional retaliatory animus was at least a determining factor in her discharge, and consequently disassociates herself from the scenario found in the Petition at 13, in which Petitioners allege that such animus played no part in the decision.

## ARGUMENT AGAINST ALLOWANCE

None of the Questions Presented by this case is appropriate for this Court's discretionary review, for the following reasons:

### A. IN RULING UPON A MOTION FOR SUMMARY JUDGMENT IN WHICH QUALIFIED IMMUNITY IS CLAIMED, THE REVIEWING COURT MUST CONSIDER THE ENTIRE RECORD AND VIEW IT IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT.

At least eight Circuits have held that, in reviewing a summary judgment motion on qualified immunity grounds, the entire record must be reviewed and all factual disputes must be resolved in favor of the non-movant. *See Turner v. Dammon*, 848 F.2d 440, 444 (4th Cir. 1988); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 719 & n.2 (10th Cir. 1988); *Martin v. Malhoyt*, 830 F.2d 237, 253-54, *reh'g denied*, 833 F.2d 1049 (D.C. Cir. 1987); *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987); *Robinson v. Viā*, 821 F.2d 913, 921-22 (2d Cir. 1987); *Trapnell v. Ralston*, 819 F.2d 182, 184

n.1 (8th Cir. 1987); *Myers v. Morris*, 810 F.2d 1437, 1459 (8th Cir. 1987); *Fernandez v. Leonard*, 784 F.2d 1209, 1213-14 (1st Cir. 1986); *Jasinski v. Adams*, 781 F.2d 843, 846 (per curiam), *reh'g denied*, 788 F.2d 694 (11th Cir. 1986); *Fludd v. United States Secret Serv.*, 771 F.2d 549, 554 (D.C. Cir. 1985); *Floyd v. Farrell*, 765 F.2d 1, 5-6 (1st Cir. 1985). Two other circuits have followed or suggested that procedure without explicit discussion of its correctness. *See Estate of Conners v. O'Connor*, 846 F.2d 1205 (9th Cir. 1988); *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986); *Kraus v. County of Pierce*, 793 F.2d 1105, 1106-07, 1110 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 1571, 94 L. Ed. 2d 763 (1987); *see also Daniel v. Taylor*, 808 F.2d 1401, 1402 (11th Cir. 1986); *De Abadia v. Izquierdo Mora*, 792 F.2d 1187 (1st Cir. 1986); *Zook v. Brown*, 748 F.2d 1161, 1166-67 (7th Cir. 1984).

The First Circuit, overruling its prior cases *sub silentio*, now examines only the complaint in resolving such a motion. *Compare Bonitz v. Fair*, 804 F.2d 164, 168 (1st Cir. 1986) *with Bonitz* at 182 (Campbell, C.J., dissenting). This approach, which eviscerates the qualified immunity defense, has been repeatedly rejected by the other Circuits. *Turner*, 848 F.2d at 443-44; *see also DeVargas*, 844 F.2d at 719; *Green*, 826 F.2d at 650-52. The First Circuit has since backed off somewhat from its pure reliance on the complaint in cases in which the plaintiff's allegations were conclusory by examining undisputed facts in the record. *See, e.g., Nunez v. Izquierdo-Mora*, 834 F.2d 19, 21-22 (1st Cir.

1987); *Juarbe-Angueira v. Arias*, 831 F.2d 11, 14 (1st Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1222, 99 L. Ed. 2d 423 (1988); *Vazquez Rios v. Hernandez Colon*, 819 F.2d 319, 321 (1st Cir. 1987); *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1259-60 (1st Cir. 1987).

In the present case, the Seventh Circuit properly examined the entire record in the light most favorable to plaintiff Conner. This Court has previously indicated that this is the proper procedure:

> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

*Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411, 425 (1985). In the present case, the evidence gleaned from discovery established genuine issues of fact that precluded summary judgement. The procedure utilized by the Seventh Circuit is in accord with the weight of authority and accords with standard summary judgment procedures. Although there is a conflict between the Circuits on this point, the recalcitrant First Circuit is moving slowly toward the position of the other Circuits. The issue is not ripe for Supreme Court discretionary review because there is no substantial conflict among the Circuits.

B. IN MAY OF 1982, THE CONSTITUTIONAL RIGHT OF A PUBLIC EMPLOYEE TO SPEAK ON A MATTER OF PUBLIC CONCERN, AS A PRIVATE CITIZEN BUT DURING WORKING HOURS, IN A MANNER IN WHICH THE FUNCTIONING OF THE EMPLOYER WAS NOT IMPAIRED, WAS CLEARLY ESTABLISHED.

When a public employee speaks on an issue of public concern in a manner embarrassing to her employer, the employee's interest in being able to speak freely must be balanced against the employer's interest in efficient public service. *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811, 817 (1968). It has been clear since 1979 that on-the-job expressions by public employees are entitled to constitutional protection if they are speaking as private individuals. *See Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 413-14, 99 S. Ct. 693, 695-96, 58 L. Ed. 2d 619, 623 (1979).

The Seventh Circuit has refined and elaborated upon the *Pickering* holding by enumerating factors to consider in performing the balancing of interests it mandates. *See Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972, 93 S. Ct. 2148, 36 L. Ed. 2d 695 (1973). The factors include the ramification of the employee's speech on discipline and employee harmony, needs for confidentiality, interference with the speaker's daily duties, and any need for a close employee-superior relationship. *Id.* The Seventh Circuit, below, examined these factors and their further

refinement by case law prior to 1982 and concluded Conner's discharge, viewed in the light most favorable to her, could not as a matter of law be categorized as done in good faith. *Conner*, 847 F.2d at 389-93 (slip op. at 8-17). The court's holding was correct, well reasoned, and fair.

### C. IN A CASE IN WHICH THE SUBJECTIVE INTENT OF THE DEFENDANT IS AN ESSENTIAL ELEMENT OF THE CONSTITUTIONAL VIOLATION CLAIMED, AND IN WHICH THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO THAT INTENT, THE DEFENDANT IS NOT ENTITLED TO QUALIFIED IMMUNITY.

This case presents an additional balancing problem, that of allowing civil rights plaintiffs to vindicate their rights when they must prove wrongful intent versus preventing vexatious litigation against public officials. *See Conner*, 847 F.2d at 398 (Cudahy, J., concurring) (slip op. at 26); *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S. Ct. 2727, 2739, 73 L. Ed. 2d 396, 411 (1982). This issue was not reached by the majority in this case. The opinion of Circuit Judge Cudahy on the point is well taken and, in Conner's view, could appropriately have been inserted into the majority opinion.

Judge Cudahy held that Conner's specific allegations of impermissible motive, supported by substantial evidence, precluded summary judgment on qualified immunity grounds, following the well-reasoned interpretations of

*Harlow* by the Ninth, and District of Columbia Circuits. *Conner*, 847 F.2d at 398-99 (Cudahy, J., concurring) (citing *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1049-51 (9th Cir. 1988); *Martin v. District of Columbia Metro. Police Dep't*, 812 F.2d 1425, 1431-33, *modified*, 817 F.2d 144, *modification vacated sub nom. Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987)) (slip op. at 26-27). The difficulty perceived by Petitioners is that *Harlow* spoke of eliminating the "subjective" aspect of the "good faith" immunity defense. *Harlow*, 457 U.S. at 815, 102 S. Ct. at 2736-37, 73 L. Ed. 2d at 408-09. The Second Circuit Court of Appeals has most succinctly solved the Petitioners' problem:

> The *Harlow* test is objective, but in the sense that a court is precluded from determining whether a public official was actually aware of the legal standards in question; instead, the official is charged with such knowledge if the appropriate legal standard is, by objective standards, clearly established at the time the official undertook the activity at issue. . . . *Harlow* precludes inquiry into the defendant's state of mind only with respect to the state of the law. . . . *Harlow* does not require us . . . to ignore the fact that intent is an element of the relevant cause of action [in this case].

*Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988).

If the law was clearly established at the relevant time, a qualified immunity defense must be rejected if a genuine issue of material fact exists that impermissible motives led to the

action complained of. *Conner*, 847 F.2d at 398-99 (Cudahy, J., concurring) (slip op. at 27-28); *Pueblo Neighborhood Health Centers, Inc. v. Losario*, 847 F.2d 642, 649 (10th Cir. 1988); *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir. 1988); *Gutierrez*, 838 F.2d at 1051 & n.29; *Musso*, 836 F.2d at 742-43; *Martin*, 812 F.2d at 1433 & n.18; *Wright v. South Ark. Regional Health Center, Inc.*, 800 F.2d 199, 202-03 (8th Cir. 1986); *Benson v. Allphin*, 786 F.2d 268, 276 n.19 (7th Cir.), *cert. denied*, ___ U.S. ___ 107 S. Ct. 172, 93 L. Ed. 2d 109 (1986); *Kenyatta v. Moore*, 744 F.2d 1179, 1185 (5th Cir. 1984), *cert. denied*, 471 U.S. 1066, 105 S. Ct. 2141, 85 L. Ed. 2d 498 (1985); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 830 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039, 103 S. Ct. 1431, 75 L. Ed. 2d 791 (1983); *but see Halperin v. Kissinger*, 807 F.2d 180, 186-87 (D.C. Cir. 1986) (not applying the rule in a national security context). Public officials are amply protected by the requirement that unsupported allegations of malice are to be ignored in determining what disputes of material fact exist. *See Pueblo Neighborhood*, 847 F.2d at 650; *Trapnell v. Ralston*, 819 F.2d 182, 185 (8th Cir. 1987); *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984); *Hobson v. Wilson*, 737 F.2d 1, 29-30 (D.C. Cir. 1984); *Miller v. Solem*, 728 F.2d 1020, 1025-26 (8th Cir.), *cert. denied*, 469 U.S. 841, 105 S. Ct. 145, 83 L. Ed. 2d 84 (1984).

As yet there are no substantial conflicts in the Court of Appeals' interpretations of *Harlow*, all of them follow the spirit of that decision, and

thus the issue is not ripe for Supreme Court discretionary review. To Respondent's knowledge, it remains true that:

> No court . . . has extended *Harlow's* proscription of subjective inquiry beyond the issue of knowledge of the law and intent related to knowledge of the law, except in a national security context.

*Halperin*, 807 F.2d at 186 (Scalia, J., sitting as designated Circuit Justice).

### D. UNDER FEDERAL COMMON LAW, A PUBLIC OFFICIAL SUED IN HIS OR HER PERSONAL CAPACITY IS NOT IN PRIVITY WITH HIS OR HER EMPLOYER FOR PURPOSES OF RES JUDICATA.

A public official sued in his or her official capacity is, quite naturally, considered in privity with his or her employer under federal claim preclusion law. *See, e.g., Lee v. City of Peoria*, 685 F.2d 196, 199 n.4 (7th Cir. 1982).

The two Circuits that have directly considered whether public officials sued in their personal capacities are in privity with their employer under federal common law have held that they are not. *See Conner, supra*, at 396 (slip op. at 22-23); *Headley v. Bacon*, 828 F.2d 1272, 1279 (8th Cir. 1987); *Beard v. O'Neal*, 728 F.2d 894, 897 (7th Cir.), *cert. denied*, 469 U.S. 825, 105 S. Ct. 104, 83 L. Ed. 2d 48 (1984); *see also* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4458, at 508 (1981) ("[A] judgment against a

government does not bind its officials in subsequent litigation that asserts a personal liability against the officials."). Because such state officials are "stripped" of their official status for Eleventh Amendment purposes, stripping of privity for § 1983 purposes is quite natural. *See Ex Parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 454, 52 L. Ed. 714, 729 (1908).

Three federal courts have held, under state law, that a prior suit in state court against a government does not preclude a later federal action against employees of that government in their personal capacities. *See Morgan v. City of Rollins*, 792 F.2d 975, 980 (10th Cir. 1986) (law of Wyoming); *Meding v. Hurd*, 607 F. Supp. 1088, 1101 (D. Del. 1985) (law of Delaware); *Roy v. City of Augusta, Me.*, 712 F.2d 1517, 1521-22 (1st Cir. 1983) (law of Maine). These cases follow the rule stated by the Restatement (Second) of Judgments § 36(2) and comment e (1982).

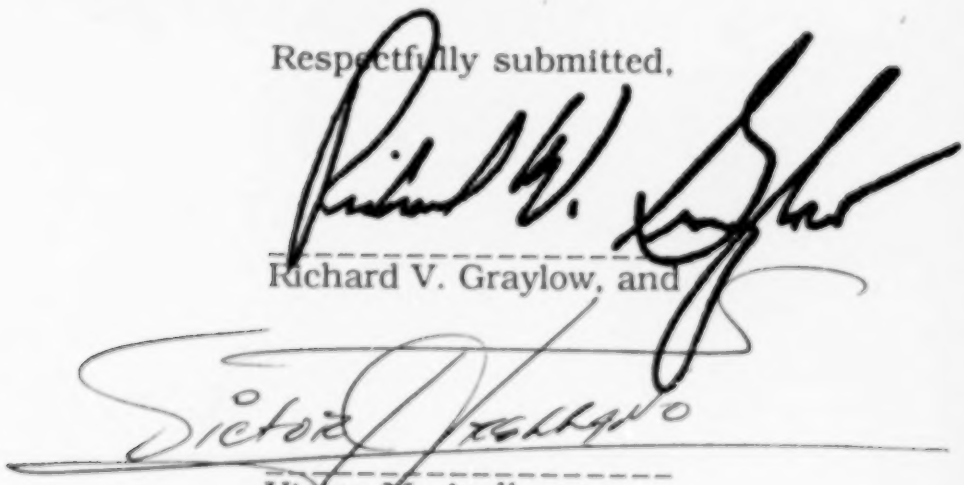
The approach of the court below is eminently reasonable, no conflict among the Circuits exists, the issue arises so infrequently that it is not of national significance, and therefore the Question Presented is not appropriate for review by this Court.

## CONCLUSION

For the reasons set forth above, the Respondent herein submits that a writ of certiorari should not be granted in this case.

Dated, signed and mailed in Madison, Wisconsin, this 31st day of August, 1988.

Respectfully submitted,



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